Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In the

Supreme Court of the United States

_____, 1996

_____*_____

VICKI HANSBERGER, DOROTHY FELTON
and TERESA PROCTOR

Appellants,

v.

THE UNITED STATES OF AMERICA

Appellee.

_____*_____

JURISDICTIONAL STATEMENT

_____*_____

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56 pp

QUESTION PRESENTED

Whether citizens of a state are entitled to intervene under Rule 24 (a) (2) of the Federal Rules of Civil Procedure in an enforcement action brought against their state under Section 5 of the Voting Rights Act when the state has conceded that it would not represent the interests of those citizens in that action.

PARTIES

The United States of America

State of Georgia

Zell Miller, Governor of the State of Georgia

Pierre Howard, Lieutenant Governor of the State of Georgia

Thomas Murphy, Speaker of the Georgia House of Representatives

Lewis Massey, Secretary of State of the State of Georgia

Vicki Hansberger

Dorothy Felton

Teresa Proctor

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New York v. U.S., _U.S._,112 S.Ch. 2408 (1995)

Coleman v. Thompson, _U.S._,111 S.Ch. 2546 (1995)

Rule: Fed. R. Civ. Pro. 24 (a) (2)

Statutes: 42 U.S.C. §§ 1973b, 1973c (1995)

JURISDICTIONAL STATEMENT

Vicki Hansberger, Dorothy Felton and Teresa Proctor, appellants, appeal from an Order entered by a three-judge panel of the United States District Court for the Northern District of Georgia on April 9, 1996, in which their timely motion to intervene in a Section 5 Voting Rights action brought against the State of Georgia and various state officials was denied.

OPINIONS BELOW

The opinion contained in the Order of the United States District Court for the Northern District of Georgia dated April 9, 1996, is unreported and is reprinted in the appendix hereto, App. 9 *infra.*

JURISDICTION

The Order of the United States District Court for the Northern District of Georgia was entered on April 9, 1996, and the instant appeal is being docketed in this Court within 90 days of that date. The jurisdiction of this Court is invoked under 42 U.S.C. §§ 1973b and 1973c.

APPLICABLE FEDERAL RULE

Federal Rule of Civil Procedure 24 (a) (2):

> Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

On August 28, 1995, the Georgia Legislature passed redistricting plans for its House of Representatives and State Senate. The plans changed 67 of the 180 House districts and 46 of the 56 Senate districts. The Legislature adopted these plans in response to this Court's decision in *Johnson v. Miller*, ___U.S.__, 115 S.Ct. 2475 (1995), in which Georgia's 1992 Congressional districting plan had been vitiated for certain constitutional defects. On September 12, 1995, Governor Zell Miller signed the new legislation into law.

On November 16, 1995, the State of Georgia submitted the 1995 redistricting plan to the United States Attorney General for review as required by Section 5 of the Voting Rights Act, 42 U.S.C. 1973c (1995). The Attorney General requested further information from the State of Georgia on December 22, 1995, the effect of which was to extend the Attorney General's sixty day deadline to respond to

the request for preclearance. On March 15, 1996, the Attorney General objected to the redistricting plans under Section 5, adducing as grounds her belief that the 1995 plan would lead to a retrogression in the position of racial minorities that is abjured by the Equal Protection clause of the Constitution. The proposed 1995 State House and Senate redistricting plans were, thus, suspended indefinitely in the absence of either a withdrawal of the objection by the Attorney General or a redemptive judgment by the United States District Court for the District of Columbia.

On March 21, 1996, the United States filed a complaint against the State of Georgia and various state officials seeking declaratory and injunctive relief and a judgment that: (1) the 1995 Georgia House and Senate redistricting plans constituted changes affecting voting within the meaning of Section 5 of the Voting Rights Act and were legally unenforceable without the requisite preclearance; (2) implementation of the 1995 plans violated Section 5 of the Voting Rights Act; (3) the State of Georgia be enjoined from administering or implementing the 1995 plans; and (4) the state be enjoined from proposing that the 1995 plans be ordered into effect by any court unless and until preclearance under Section 5 was obtained. The United States also filed an Application for a Temporary Restraining Order seeking to enjoin the state from administering or attempting to administer or implement the 1995 plans unless and until preclearance under Section 5 had been obtained.

On March 25, 1996, appellants, Vicki Hansberger, Dorothy Felton and Teresa Proctor, filed their Motion for Intervention request-

ing that they be permitted to intervene for the purpose of seeking a declaratory judgment that Section 5 of the Voting Rights Act was unconstitutional under, among other provisions, the Guarantee Clause of the United States Constitution, U.S. Const. art. IV, § 4. That motion was opposed both by the United States and by the State of Georgia. On April 4, 1996, the three judge panel heard arguments on the pending motions and, on April 9, 1996, entered two orders granting the relief sought by the United States and denying appellants' motion to intervene.

The denial of appellants' motion to intervene was based principally upon the court's confessed inability to find an "interest" sufficient to satisfy the requirements of Rule 24 (a) (2) of the Federal Rules of Civil Procedure.

THE QUESTION IS SUBSTANTIAL

The lower court acknowledged the significance of the question presented with the importunate observation that: "Unfortunately, [t]here is not as yet any clear definition, either from the Supreme Court or from the lower courts, of the 'interest relating to the property or transaction which is the subject of [the] action' that is required for intervention of right." See App.15, *infra.* If concerned citizens with unquestionable standing cannot intervene in an action that affects a right and "interest" that has been deemed by this Court as fundamental, i.e., the right to vote, that "interest" has been attenuated far beyond the bounds of what this Court has without equivocation designated as "fundamental."

CONCLUSION

In *New York v. U.S.*, ___U.S.___, 112 S.Ct. 2408, 2431 (1992), Justice O'CONNOR described precisely the "interest" at stake in this case:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of *individuals*. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." Coleman v. Thompson, 501 U.S. ___, ___, 111 S.Ct. 2546, 2570 (1991) [Blackmun, J., dissenting]. (emphasis added)

___U.S.___, 112 S.Ct. at 2431. The professed inability of the lower court to discover an "interest" of the appellants sufficient to acknowledge their right to intervene in an action that affects unquestionably a fundamental right is a mockery of this Court's pronouncements and of participatory democracy. For this reason, and this reason alone, the Court should note probable jurisdiction and permit this appeal to proceed.

Respectfully submitted,

[same as cover page]

[date]

THE QUESTION IS SUBSTANTIAL

This is to certify that I have this day served counsel for Appellees with the foregoing Jurisdictional Statement by depositing a copy of same in the United States mail with sufficient postage delivery addressed to the following:

Janet Reno
Isabelle Katz Pinzlier
Elizabeth Johnson
Donna M. Murphy
Richard B. Jerome
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United States Attorney General's Office
Department of Justice
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This is to further certify that I have served the following additional parties, whom I believe to be counsel for the Defendants, with a copy of such pleading by facsimilie transmission and by depositing a copy of same in the United States mail with sufficient postage to insure delivery addressed to the following:

Michael Bowers
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This 8th day of July 1996.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE UNITED STATES OF AMERICA, Plaintiff, V. STATE OF GEORGIA, ZELL MILLER, in his official capacity as Governor of the State of Georgia; PIERRE HOWARD, in his official capacity as Lieutenant Governor of the State of Georgia and President of the Georgia Senate; THOMAS MURPHY, in his capacity as Speaker of the Georgia House of Representatives; and LEWIS MASSEY, in his official capacity as Secretary of State of the State of Georgia, Defendants,	: CIVIL ACTION : NO. 1:96-CV-700-JEC

ORDER

This case is presently before the Court on Plaintiff's Application for a Temporary Restraining Order and Preliminary Injunction [3] and Application for Permanent Injunction. The Court has reviewed the record and heard the arguments of the parties and, for the reasons set out below, concludes that Plaintiff's Application for Temporary Restraining Order and a Preliminary Injunction is granted in part and

denied in part, as is Plaintiff's Appiication for Permanent Injunction.

BACKGROUND

Since November 1, 1964, the State of Georgia and its subdivisions have been subject to the preclearance requirements of Section 5 of the Voting Rights Act of 1965, as amended (hereinafter "Section 501), 42 U.S.C. § 1973c. *See* 28 C.F.R. § 51 at app. (listing Georgia as covered jurisdiction).

In April, 1992, the State of Georgia enacted redistricting plans for the Georgia House of Representatives and the Georgia Senate, O.C.G.A. §§ 28-2-1 and 28-2-2. The State submitted these plans to the Attorney General of the United States ("Attorney General") for review, pursuant to Section 5. The Attorney General precleared these redistricting plans on April 3, 1992. With only limited, and precleared, changes, the State used these redistricting plans for primary and general elections in 1992 and 1994.

On August 28, 1995, the Georgia Legislature, sitting in a Special Session, passed new redistricting plans for its House of Representatives (Act No. EX2) and State Senate (Act No. EX3) (hereinafter referred to as "the 1995 redistricting plans"). The proposed State Senate plan makes changes to 46 of the 56 Senate districts. The proposed House plan makes changes to 67 of the 180 House districts. on

September 12, 1995, Governor tell Miller signed this legislation.

The State contends that these new plans became necessary as a result of the supreme Court decision in *Johnson v. Miller*, 115 S.Ct. 2475 (1995), hereinafter referred to as "*Johnson I*". "*Johnson I*" addressed the 1992 Georgia Congressional distracting plan and held that certain districts had been unconstitutionally drawn. The State contends that some of the 1992 legislative districts were likewise subject to the same Constitutional defects and had to be redrawn in order to comply with federal Constitutional standards. *See, e.g.*, Letter from Michael Bowers, Georgia Attorney General (Compl. at Ex. B).

On November 16, 1995, the State of Georgia submitted the 1995 redistricting plan to the United States Attorney General for review, as required by Section 5. The Attorney General requested further information from the State of Georgia on December 22, 1995, The effect of this request was to extend the Attorney General's sixty day deadline in which it is required to respond to the request for preclearance. *See* 42 U.S.C. § 1973c.

On March 5. 1996, several residents of the State of Georgia brought an action challenging the 1992 Georgia mouse and Senate redistricting plans as unconstitutional racial gerrymanders. *Johnson v. Miller*, No. CV196-040 (hereinafter "*Johnson III*"). Additionally, some of the same plaintiffs sought to amend the original complaint in Johnson I to add a claim .challenging the 1992 State and House Senate District.

On March 15, 1996, the Attorney General interposed a timely

objection under Section 5 to the 1995 redistricting plans[1]. Articulating the basis for her objection, the Attorney General indicated her belief that the 1995 plan would lead to a retrogression in the position of racial minorities that is not required by the Equal Protection clause of the Constitution. (Compl. at Ex. Al at 10.) She also informed the State that "until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the proposed 1995 State House and Senate redistricting plans continue to be legally unenforceable *Clark v. Roemer*, 500 U.S. 64 6 (1991); 28 C.F.R. 51.10 and 51.45." (*Id.* at 11.)

On March 21, 1996, plaintiff filed a Complaint seeking to convene a court of three judges to enter a judgment that: (1) the 1995 Georgia House and Senate redistricting plans constitute changes affecting voting within the meaning of Section 5 of the Voting Rights Act and are legally unenforceable because they have not received the requisite preclearance under Section 5; (2) the implementation of the 1995 Georgia House and Senate redistricting plans violates Section 5; (3) enjoining defendants from administering or implementing the 1995 Georgia House and Senate redistricting plans; and (4) enjoining defendants from proposing that the 1995 Georgia House and Senate re-

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[1] While the objection was "timely" within the meaning of the Voting Rights Act, the objection was made on a Friday and the Georgia General Assembly was required to, and did, adjourn on the following Monday, March 18, 1996. *See* 42 U.S.C.S. 1973b .(permitting voting change to be enforced if Attorney General."has not interposed an objection within sixty days after such submission") ; GA, Const. Art. 3, §4¶1 (a) ("The General Assembly shall meet in regular session , - and may continue in session for a period of *no longer* than 40 days in the aggregate each year." (emphasis added)).

districting plans be ordered into effect by any court unless and until preclearance under Section 5 is obtained. (compl. at 8-9.) That same day, plaintiff also filed an Application for a Temporary Restraining Order and Preliminary injunction seeking to enjoin defendants from administering, or attempting to administer or implement, the 1995 Georgia House and Senate redistricting plans unless and until those plans receive preclearance pursuant to Section 5.

On April 4, 1996, this Court heard argument on the Motion for Preliminary Injunction, as well as the Application for Permanent Injunction. Specifically, the parties agreed that the Court should and could decide the Application for Permanent Injunction as well as the Application for Preliminary Injunction following this hearing.

DISCUSSION

Plaintiff requests that this Court enjoin defendants from implementing or attempting to administer the 1995 redistricting plan as it has not been precleared by either the Attorney General or the District of Columbia. Although acknowledging that the Attorney General has not precleared the 1995 plans, the defendants argue, for the most part, that the 1995 redistricting plan should be used on an interim basis for the upcoming election because the Attorney Generals' objections ignore the Supreme Court's decision in *Johnson I* and the 1992 plans are unconstitutional in light of that decision.

Section 5 of the Voting Rights Act prohibits the implementa-

tion of a voting change by a covered jurisdiction unless and until the jurisdiction establishes that the change will not have the effect of denying or abridging the right to vote on account of race or color. 42 U.S.C. § 1973c. A covered jurisdiction may establish this by either: (1) submitting the proposed voting change to the office of the Attorney General of the United States and obtaining preclearance to implement the change; or (2) by instituting an action in the United States District Court for the District of Columbia for a declaratory judgment that the change will not have the effect of denying or abridging the right to vote on account of race or color, 42 U.S.C. § 1973c, "A voting change in a covered jurisdiction 'will not be effective as law until and unless cleared' pursuant to one of these two methods.", *Clark v. Roemer,* 500 U.S. 6460 652 (1991).

In this case, it is undisputed that Georgia is a covered jurisdiction under the Voting Rights Act. *See* 28 C.F.R. § 51 at app, (listing Georgia as covered jurisdiction). Accordingly, the State submitted its 1995 redistricting plan to the Attorney General for bar preclearance, Pursuant to 42 U.S.C. § 1973c, the Attorney General interposed a timely objection to the 1995 redistricting plan on March 15, 1996. Consequently, the Attorney General has not precleared the 1995 redistricting plan.

Acknowledging that the 1995 redistricting plan has not received preclearance, the State of Georgia complains that the objections to the 1995 redistricting plan are not well founded. The State of Georgia asks this Court to deny the request for the injunction and permit it to proceed with implementation of the 1995 redistricting

plan.

The Voting Rights Act "requires preclearance of new legislative apportionment plans that are adopted without judicial direction or approval." *McDaniel v. Sanchez*, 452 U.S. 130, 138 (1981). See *Clark v. Roemer*, 500 U.S. at 654 (holding that district court erred in not enjoining elections that were held utilizing an unprecleared plan), Thus, this Court has no power to weigh the merits of the Attorney General's objections, but instead may determine only whether the plan has been precleared. Defendants concede that the Attorney General has not procleared the plan. Because the plan has not been precleared, the Court is required to grant the injunction. Accordingly, the Court **GRANTS** plaintiff's motion for an order enjoining defendants from administering or implementing the 1995 redistricting plan.

In addition, plaintiff seeks to foreclose the State of Georgia from arguing for the implementation of the 1995 redistricting plans as an interim remedy in Johnson III. In exigent circumstances, courts have utilized parts of unprecleared, legislatively-enacted plans as interim remedies. See e.g. *Terrazas v. Clemenus*, 537 F.Supp. 514 (N.D.Tex. 1982) (utilizing parts of unprecleared legislatively enacted plan as interim remedy because of exigent circumstances - - namely imminent election). Thus, it may be entirely appropriate for defendants to argue that the 1995 plans are a satisfactory interim remedy should the Johnson III court determine that the 1992 plans are unconstitutional, under the facts of this case, an order that essentially "muzzles" one of the parties is inappropriate and unwarranted. Accordingly, the Court **DENIES** this part of plaintiff's requested relief.

CONCLUSION

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the State of Georgia, the individual defendants, and all other state officers, agents, servants, employees, attorneys, and all others in active concert or participation with it are hereby ENJOINED from administering or implementing, or attempting to administer or implement, the 1995 Georgia House and Senate redistricting plans to which the Attorney General has interposed a timely objection, unless and until preclearance is obtained pursuant to Section 5 of the Voting Right Act of 1965, as amended, 42 U.S.C.§ 1973c, or unless and until all, or part, of the 1995 Georgia House and Senate redistricting plans are adopted as an interim plan by the court in *Johnson v. Miller*, No. CV196-040 (1996) (*Johnson III*) result of a determination, if such determination is made up that the 1992 Georgia House and Senate redistricting plans are unconstitutional.

ENTERED this 9th day of April, 1996.

_____
UNITED STATES CIRCUIT JUDGE

_____
UNITED STATES DISTRICT JUDGE

_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE UNITED STATES OF AMERICA, Plaintiff,	:	CIVIL NO. 1:96-CV-700-JEC
V.	:	
STATE OF GEORGIA, ZELL MILLER, in his official capacity as Governor of the State of Georgia; PIERRE HOWARD, in his official capacity as Lieutenant Governor of the State of Georgia and President of the Georgia Senate; THOMAS MURPHY, in his capacity as Speaker of the Georgia House of Representatives; and LEWIS MASSEY, in his official capacity as Secretary of State of the State of Georgia,	:	
Defendants,	:	

ORDER

This case is presently before the Court on Movants' Vicki Hansberger, Dorothy Felton and Teresa Proctor's Motion for Intervention [4]. The Court has reviewed the record and heard the arguments of the parties and, for the reasons set out below, concludes that Movants' Motion for Intervention is denied.

BACKGROUND

Since November 1, 1964, the State of Georgia and its subdivisions have been subject to the preclearance requirements of Section 5 of the Voting Rights Act of 1965, as amended (hereinafter "Section 5"), 42 U.S.C. § 1973c, *See* 28 C.F.R. § 51 at app. (listing Georgia as covered jurisdiction) .

In April, 1992, the state of Georgia enacted redistricting plans for the Georgia House of Representatives and the Georgia Senate. O.C.G.A. §§ 28-2-1 and 28-2-2, The State submitted these plans to the Attorney General of the United States ("Attorney General") for review, pursuant to Section 5. The Attorney General precleared these redistricting plans on April 3. 1992. With only limited, and precleared, changes, the State used these redistricting plans for primary and general elections in 1992 and 1994,

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The State contends that these new plans became necessary as a result of the Supreme Court decision in *Johnson v. Miller*, 115 S. Ct. 2475 (1995), hereinafter referred to as "*Johnson I*". *Johnson I* addressed the 1992 Georgia Congressional distracting plan and held that

certain districts had been unconstitutionally drawn. The State contends that some of the 1992 legislative districts were likewise subject to the same Constitutional defects and had to be redrawn in order- to comply with federal Constitutional standards. See, e.g., Letter from Michael Bowers, Georgia Attorney General (Compl. at Ex. B).

On November 16, 1995, the State of Georgia submitted the 1995 redistricting plan to the United States Attorney General for review, as required by Section 5. The Attorney General requested further information from the State of Georgia on December 22, 1995. The affect of this request was to extend the Attorney General's sixty day deadline in which it is required to respond to the request for preclearance. See 42 U.S.C. § 1973c.

On March 5. 1996, several residents of the State of Georgia brought an action challenging the 1992 Georgia House and Senate redistricting plans as unconstitutional racial gerrymanders. *Johnson v. Miller*, No. CV196-040 (hereinafter "*Johnson III*"). Additionally, some of the same plaintiffs sought to amend the original complaint in *Johnson I* No - CV194-009 , case to add a claim challenging the 1992 State and House Senate District.

On March 15, 1996, the Attorney General interposed a timely

objection under Section 5 to the 1995 redistricting plans[1]. Articulating the basis for her objection, the Attorney General indicated her belief that the 1995 plan would lead to a retrogression in the position of racial minorities that is not required by the Equal Protection clause of the Constitution. (Compl. at Ex. A. at 10,) She also informed the State that "until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the proposed 1995 State House and Senate redistricting plans continue to be legally unenforceable, *Clark v. Roemer*, 500 U.S. 646 (1991); 2B C.O.F.R. 51.10 and 51.45." (*Id.* at 11.)

On March 21, 1996, plaintiff filed a Complaint seeking to convene a court of three judges to enter a judgment that: (1) the 1995 Georgia House and Senate redistricting plans constitute changes affecting voting within the meaning of Section 5 of the Voting Rights Act and are legally unenforceable because they have not received the requisite preclearance; (2) the implementation of the 1995 Georgia House and Senate redistricting plans violates Section 5; (3) enjoining defendants from administering or implementing the 1995 Georgia House and Senate redistricting plans; and (4) enjoining defendants from proposing that the 1995 Georgia House and Senate redistricting

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[1]While the objection was "timely" within the meaning of the Voting Rights Act, the objection was made on a Friday and the Georgia General Assembly was required to, and did, adjourn on the following Monday, March 18, 1996, See 42 U.S.E.C. § 1973b (permitting voting change to be enforced if Attorney General "has not interposed an objection within sixty days after such submission"); GA-CONST. Art. 3 r, §4, ¶1(a) ("The General Assembly shall meet in regular session . . . and may continue in session for a period of no longer than 40 days in the aggregate each year," (emphasis added).

plans be ordered into effect by any court unless and until preclearance under Section 5 is obtained. (Compl. at 8-9.) That same day, plaintiff also filed an Application for a Temporary Restraining order and Preliminary Injunction seeking to enjoin defendants from administering, or attempting to administer or implement, the 1995 Georgia House and Senate redistricting plans unless and until those plans receive preclearance pursuant to Section 5.

On March 25, 1995, movants Vicki Hansberger, Dorothy Felton and Teresa Proctor filed a Motion for Intervention. Movants request that they be permitted to intervene in order to seek a declaratory judgment that Section Five of the Voting Rights act is unconstitutional on the grounds that it violates Movants' rights under the guarantee of a republican form of government which is made to the States and their citizens by the United States Constitution, the Privileges and Immunities Clause of the United States Constitution, and the Fifth, Ninth, Tenth, Fourteenth and Fifteenth Amendments to the United States Constitution. (Mot. to Intervene [4], at 3.)

On April 4. 1996, this Court heard argument on the Motion for Preliminary injunction and Permanent Injunction and on the Motion to Intervene.

DISCUSSION

A. Intervention As of Right

Movants Vicki Mansberger, Dorothy Felton and Teresa Proctor (hereinafter "the Applicants") seek intervention as of right under FED. R Civ. P. 2 4 (a) (2), which provides:

> Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicants interest is adequately represented by existing parties.

FED. R. Civ. P. 24(a)(2), In order to intervene as a matter of right, the Applicants must show that: (1) their application to intervene is timely; (2) they have an interest relating to the property or transaction which is the subject of the action; (3) they are so situated that disposition of the action, as a practical matter, may impede or impair their ability to protect that interest; and (4) their interest is represented inadequately by the existing parties to the suit. *Worlds v. Dept. of Health and Rehabilitative Serv.*, 929 F. 2d 591, 593 (11th Cir, 1991) ; *Chiles v. Thornburgh*, 865 F. 2d 1197, 1213 (11th Cir. 1989). There is no dispute that the Applicants have satisfied the first prong of the intervention as a matter of right analysis.

1. "Interest" of the Applicants

Unfortunately, "[t]here is not as yet any clear definition, either from the Supreme Court or from the lower courts, of the nature of the interest relating to the property or transaction which is the subject of [the] action' that is required for intervention of right," 7C CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1908, at 263 (1986) (hereinafter "WRIGHT") . Although the Supreme Court has described the type of interest contemplated by the rule as a "significantly protectable interest," *Donaldson v. United States*, 400 U.S. 517, 531 (1971). This phrase does little (if anything) to provide more guidance than the bare term "interest" as used in the rule itself. *See* WRIGHT § 1908., at 270.

With respect to protectable "interest," it is easier to state what the rule does not require than what it requires. The rule does not require an interest in property, an economic interest, or that the intervenor would somehow be "bound" by a judgment in the case if *not* allowed to intervene. The 1966 amendments to the rule were passed for the purpose of eliminating these requirements, which were viewed as unduly restrictive. *See* WRIGHT 5 1908, at 283-84 (citing *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) (en banc).

It has been suggested that courts nay be led astray by a "myopic fixation" on the term "interest," and that the policies underlying the interest requirement should guide the analysis. *Smuck*, 408 P.2d at 179-80. In *Smuck*, the court described these policies as follows:

> The decision whether intervention of right is warranted thus involves an accommodation between two potentially conflicting goals: to achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming fruitlessly complex or unending. Since this task will depend upon the contours of the particular controversy, general rules and past decisions cannot provide uniformly dependable guides. . . .
>
> This does not imply that the need for an "interest" in the controversy should or can be read out of the rule. But the requirement should be viewed as a prerequisite rather than relied upon as a determinative criterion for intervention. *If barriers are needed to limit extension of the right to intervene the criteria of practical harm to the applicant and the adequacy of representation by others are better suited to the task.*

Smuck, 408 F, 2d at 179-80 (emphasis added)

Because the boundaries of the term "interest" are unclear under the rule, it is useful to follow the advice of the *Smuck* court and consider the other criteria of the rule.

2. Practical Harm to the Applicant

The rulers "practical harm" criterion is satisfied whenever disposition of the case would put the applicant at a practical disadvantage in protecting his interest. *See* WRIGHT § 1908i at 302. This practical disadvantage includes, but is not limited to, the stare decisis affect that a judgment in the case may create. *Id*, at 302-05 (citing and

discussing *Atlantis Dev. Corp. v. United States*, 379 F.2d 818 (5th Cir, 1967).

Significantly, courts have found that the "practical harm" requirement is not met when the would-be intervenor could protect its interest in a separate lawsuit, "[T]he practical disadvantage of filing a separate suit and perhaps duplicating some of the efforts in the ongoing action are not sufficient to meet the criterion of the rule," WRIGHT § 1908, at 312. Numerous cases have denied intervention to parties upon a finding that the would-be intervenor could vindicate its interests through a separate lawsuit. *Id.* at n. 69 (citing cases).

3. Inadequacy of Representation

The showing required for inadequate representation "should be treated as minimal", *Trbovich v. United Mine Workers*, 404 U.S. 529, 538 n, 10 (1972). "[T]here is good reason in most cases to suppose that the applicant is the best judge of the representation of his own interests and to be liberal in finding that one who is willing to bear the cost of separate representation may not be adequately represented by the existing parties." WRIGHT § 1909, at 317.

> [I]f [the applicants interest] is similar to, but not identical with, that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, but he ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee.

Id. at 319.

4. Application of Fed. R. Civ. p. 24(a) to Applicants

The precise "interest" that the Applicants seek to protect by intervening as defendants in this action is unclear. The Applicants state that they seek to intervene in order to vindicate their interest in a "republican form of government." They assert that if the United States prevails in its enforcement action the "likely result" will be that no elections will be held in 1996 and that this will likely cause Georgia's governance to "be placed in the hands of its executive branch of government in a quasi-martial emergency or in the hands of the federal courts." As stated, the Applicants asserted interest in this lawsuit is dependent upon a triple contingency. First, the United States must prevail in this action. Second, the remedy in the enforcement action must bring about the "likely result" that no elections will be held in 1996. Third, the absence of elections in 1996 must place the governance of the state in the hands of the executive in a "quasimartial emergency or in the hands of the federal courts."

In the Second circuit, at least, such contingent interests are insufficient under the rule. In *Washington Elec. v. Mass. Mun. Wholesale Elec.*, 922 F - 2d 92 (2nd Cir. 1990) the court held:

> [The rules requirement] that the putative intervenor have an interest in the proceeding, requires that interest be direct, substantial, and legally protectable. *An interest that is remote from the subject matter of the proceeding, or what is contingent upon the occurrence of a sequence of events before it becomes colorable will not satisfy the*

> *rule.* Here, VDPS's interest is based on a double contingency: WEC first must win a judgment against MMWEC, and the Board then must determine that ratepayers are entitled to a percentage of that recovery. Such an interest cannot be described as direct or substantial.

Id, at 96-97 (emphasis added) (citations omitted)

Applying the reasoning of the Second Circuit to this case, the Applicants' asserted interest is too remote, There appears to be a substantial likelihood that the first contingency will come about - - that is, that the United States will ultimately prevail in this action, particularly in light of the fact that the Court has, by separate order today, granted in part the injunction sought by the United States- There is, however, a much lower likelihood that the other contingent events underlying the Applicants" asserted interest will come to pass. First, it is not at all clear that the "likely result" of this action will be that no elections will take place in 1996, Second, it is not at all clear that the absence of timely elections would deny the Applicants their right to a republican form of government. By placing Georgia under martial law or under rule of the courts. Georgia's legislature is out of session for most of the calendar year anyway, but the absence of ongoing legislative action does not deny Georgians the right to a republican form of government, place then under martial law, or place their governance "in the hands of the federal courts."

Quite apart from the "interest" identified by their Motion to Intervene, the Applicants seek to counterclaim for a declaratory judgment that Section Five of the Voting Rights Act is unconstitutional,

To the extent the Applicants have any distinct interest in obtaining such a declaration, two things are fairly clear, First, the Applicant's asserted interest will not be impaired by a judgment in this action. A judgment in this action will require no express holding regarding the constitutionality of section Five the constitutionality of Section Five will not even be raised by the enforcement action unless the Applicants are allowed to raise it. Second, the Applicants can vindicate their interest by filing their own separate lawsuit challenging the 1992 reapportionment plan.

In summary, the interests asserted by the Applicants are too speculative to satisfy the rule or cannot be impaired by the United States enforcement action (or both). Thus, the Applicants do not qualify for mandatory intervention as defendants in this action,

B. Permissive Intervention

In addition to their Motion to Intervene as of right, the Applicants make an alternative motion seeking permissive intervention under FED. R. Civ. P. 24 (b) (2) which provides:

> Upon timely application anyone may be permitted to intervene in an action . ..(2) when an applicants claim or- defense and the main action have a question of law or f act in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

FED. R. civ. P, 24(b) (2).

In this cases the United States' enforcement action is the main action in this case. The Applicants seek to assert a counterclaim for a declaratory judgment that Section Five of the voting Rights Act is unconstitutional. The main action in this case does not raise a question regarding the constitutionality of Section Five of the Voting Rights Act. Therefore, the Applicants putative counterclaim does not present "a question of law or fact in common" with the main action, except in the general sense that the United States, enforcement action is premised on the assumption that the United States is acting under the authority of a constitutional statute.

Even if the Applicants' putative counterclaim raised a common question with the main action in this case, this Court is required to consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." The original parties are in agreement that this action requires prompt resolution in view of the impending qualification .deadlines for candidates seeking election to the Georgia General Assembly. The original parties have indicated both the desire and the ability to expedite the resolution of this lawsuit without the delay that would be caused by extensive discovery and a lengthy trial. Conversely, counsel for the Applicants has indicated that the Applicants would require approximately four months to complete discovery and that a considerable amount of time would be required to try the merits of the constitutional issues the applicants seek to raise.

The Applicants' extensive discovery and trial requirements, in contrast to the expedited requirements of the original parties, signal that the Applicants' putative counterclaims do not, in any significant way, present "a question of law or fact in common" with the main action in this case. Moreover, the delay that would be caused by participation of the Applicants would unduly prejudice both the original parties to this case and the public interest in promptly resolving this dispute, accordingly, the Applicants' motion for permissive intervention is denied.

CONCLUSION

According, the Court concludes that Movants' Motion for Intervention [4] is DENIED.

SO ORDERED this 9th day of April, 1996.

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

THE UNITED STATES OF AMERICA,	
Plaintiff,	) CIVIL ACTION FILE No.
	) 96-700
V.	)
	)
STATE OF GEORGIA, ET AL.,	)
	)
Defendants.	)
	)
VICKI HANSBERGER, DOROTHY FELTON and TERESA PROCTOR,	)
	)
Applicants for Intervention	)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Vicki Hansberger, Dorothy Felton and Teresa Proctor, the above-named applicants for intervention, hereby appeal to the Supreme Court of the United States from the final judgement of the three-judge district court, denying intervenor status to the above named applicants in this action on April 9, 1996.

This appeal is taken pursuant to 42 U.S.C. §§ 1973b and 1973c.

Jule W. Felton, Jr.
Counsel for Intervenor Applicants
Proctor, Felton, Atkinson & Chambers
3520 Piedmont Road, Suite 350
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(404) 816-4070

Of Counsel:
Southeastern Legal Foundation
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Atlanta, Georgia 30326
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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for Plaintiff with foregoing **NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES** by depositing a copy of same in the United States mail with sufficient pomp to delivery addressed to the following:

Deval L. Patrick
Elizabeth Johnson
Donna M. Murphy
Isabelle Katz Pinzler
Richard B. Jerome
Daniel H. Claman
United States Attorney General's Office
Department of Justice, Civil Rights Division
P. 0. Box 66128
Washington, D.C. 20035-6128

This is to further certify that I have served counsel for Defendants with a copy of such pleading by depositing a copy of same m the United States mail with sufficient postage affixed to insure delivery addressed to the following:

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David F. Walbert, Esq.
Walbert & Mathis
Suite 1010 - The Equitable Building
100 Peachtree Street
Atlanta. Georgia 30303

Sewell Brumby, Esq.
Legislative Counsel
316 State Capitol Building
Atlanta, Georgia 30334

This 31st day of May, 1996.

Jule W. Felton, Jr.
Counsel for Intervenor Applicants

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

THE UNITED STATES OF AMERICA, Plaintiff,	) CIVIL ACTION FILE No.) 96-700
V.	)
STATE OF GEORGIA, ET AL., Defendants.	)
VICKI HANSBERGER, DOROTHY FELTON and TERESA PROCTOR, Applicants for Intervention	)

MOTION FOR INTERVENTION

NOW COME Vicki Hansberger, Dorothy Felton and Teresa Proctor (hereinafter collectively referred to as "Movants") and move this Court for an order permitting them to intervene in this action as Defendants pursuant to F.R.C.P. 24 on the following ground:

1. Movant Vicki Hansberger (hereinafter "Candidate") is a resident of the State of Georgia, residing at 285 Junction Track, Roswell, Georgia 30075. Candidate resides within the jurisdictional limits of Georgia State Senate District 56 and has announced that she will be a candidate for such State Senate seat in the Republican Primary to be held in July of 1996, and, if she gains the nomination through such primary, in the general election for such seat to be held in November of 1996. The boundaries of State Senate District 56, as constituted following the redistricting which occurred after the census of 1990, were modified by 1995 Ga. Laws, Ex. Sess, page 6 et seq. The relief requested by the Plaintiff in this action will directly affect the conduct of the election in which Candidate will be a candidate.

2. Movant Dorothy Felton (hereinafter "Incumbent) is the incumbent State Representative from Georgia State House District 43 and resides at 465 Tanacrest Drive, Atlanta, Georgia 30328. Incumbent intends to stand for re-election for such seat in the Republican Primary to be held in July of 1996, and, if she gains the nomination through such primary, in the general election for such sea to be held in November of 1996. The relief requested by the Plaintiff in this action will directly affect the conduct of the election in which Incumbent will be a candidate.

3. Movant Teresa Proctor (hereinafter "Voter") is a registered voter in the State of Georgia and resides at 475 Huntcliff Green, Atlanta, Georgia 30350. Such residence is within the limits of both State Senate District 56 and House District 43. Voter intends to vote for both Candidate and Incumbent in the elections to be held in 1996. Moreover, upon information and belief, the incumbent in State Senate District 56 intends not to stand for rejection and to remove her domicile from the State of Georgia. If the relief requested by Plaintiff in this action is granted, the likely result will be that there will be no elections held in 1996. If no elections are held, State Senate District 56 will become vacant upon the incumbent's removal of her domicile, thus depriving Voter of her rights to representation in the General Assembly.

4. Moreover, under the Constitution of the State of Georgia, if new elections for the General Assembly are not held in 1996, all seats in the Georgia General Assembly will become vacant as of January 1, 1997. There is no provision in Georgia law for the 'hold-

ing-over' of state legislative seats. Without a duly elected and convened Assembly, which is the likely result of the relief sought by the Plaintiff, the governance of this State will be placed in the hands of its executive branch of government in a quasi-rnartial emergency or in the hands of the federal courts in this case or the related action in the State District. Such an outcome would be a blatant violation of the Movants rights as citizens under the Georgia Constitution, the guarantee of a republican form of government which is made to the States and their citizens by the United States Constitution, the privileges and immunities clause of the United States Constitution and the Fifth, Ninth, Tenth, Fourteenth and Fifteenth Amendments to the United States Constitution.

5. Movants' rights and interests are not adequately represented or protected by the existing parties in this case. If permitted to intervene, Movants will counterclaim for a declaratory judgment that Section Five of the Voting Rights act is unconstitutional on that grounds that it violates Movants' rights under the guarantee of a republican form of government which is made to the States and their citizens by the United States Constitution, the privileges and immunities clause of the United States Constitution, and the Fifth, Ninth, Tenth, Fourteenth and Fifteenth Amendments to the United States Constitution. Movants would show that the "temporary" exemption from the Constitution which was made by the United States Supreme Court in South Carolina v. Katzenbach, 383 U.S. 301 (1966) and continued in City of Rome v. United States, 446 U.S. 156 (1980) is no longer applicable due to the passage of time and the practical removal

of all race-based barriers to participatory democracy in the "covered jurisdictions". Movants would farther show that Section 5 of the Voting Rights Act is instead now used by the Justice Department as a tool for partisan gerrymandering and conscious racial discrimination against majorities and in favor of race-based "proportional representation" theories. The original defendants herein, in previously substantially similar actions, have never questioned the continuing authority of the Plaintiff to undermine the sovereignty of the State of Georgia and her citizens through Section 5 of the Voting Rights Act, but only its application in particular instances.

6. In previous substantially similar actions, the named defendants herein have attempted to surrender the constitutional rights of their constituents by "settling" Voting Rights Act cases. In Brooks et al v. State Board of Elections et al., Civil Action 88-CV-146 (T.J.S.D.C. Southern District of Georgia), the named defendants to a Statement which would have directly violated the constitutional rights of Movants to elect their state judges had not citizens of this State intervened in such action to block the approval of such settlement.

7. Because the rights of Movants will be directly and adversely affected if the relief sought by Plaintiff is granted, Movants show that they should be permitted to intervene as a matter of right pursuant to F.R.C.P. 24 (A) for the reason that Movants' rights will be directly affected by the outcome of this action and Movants are so situated that the disposition of this action may, as a practical matter, impair and impede Movants' ability to protect such rights. Movants further show that these interests are not adequately represented by the

existing defendants for the above stated reasons.

8. Should this Court hold that Movants are not entitled to as a matter of right, then alternatively Movants show they should be permitted to intervene to F.R.C.P. 24 (B) for the reason that Movants' claims and defences and the main action have common questions of law and fact.

9. This Motion has been filed on an emergency basis, and Movants request leave of this Court to further amend this Motion, submit additional argument and citation of authorities in support thereof and responsive pleadings to the Complaint herein within the response period allowed to original defendants.

WHEREFORE, Movants respectfully request this Court to enter an order allowing Movants to be made parties defendant to this action on the foregoing grounds and to allow the filing of defensive pleadings and counterclaims within the same response period as is allowed to the original defendants

Respectfully submitted this 22nd day of March, 1996.

Robert J. Proctor
Georgia Bar No. 588438
Attorney for Movants

Proctor, Felton, Atkinson & Chambers
3520 Piedmont Road, Suite 350
Atlanta, Georgia 30350
(404) 816-4070

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for Plaintiff with the foregoing **MOTION FOR INTERVENTION** by depositing a copy of same in the United States mail with sufficient postage affixed to insure delivery addressed to the following:

Janet Reno
Isabelle Katz Pinzlier
Elizabeth Johnson
Donna M. Murphy
Richard B. Jerome
Daniel H. Claman
United States Attorney General's Office
Department of Justice
P.O. Box 66128
Washington, D.C. 20035-6128

This is to further certify that I have served the following additional parties, whom I believe to be council for the Defendants, with a copy of such pleading by depositing a copy of same in the United States mail with sufficient postage affixed to insure delivery addressed to the following:

Michael Bowers
Attorney General
State of Georgia
40 Capitol Square
Atlanta, Georgia 30334-1300

David F. Walbwt
Walbert & Mathis
Suite 1400 - The Equitable Building
100 Peachtree Street
Atlanta, Georgia 30303

This 22nd day of March, 1996.

Robert J. Proctor
Georgia Bar No. 588438
Attorney for Movants

Proctor, Felton, Atkinson & Chambers
3520 Piedmont Road, Suite 350
Atlanta, Georgia 30350

(404) 816-4070

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

THE UNITED STATES OF AMERICA, Plaintiff,	) CIVIL ACTION FILE No. 96-700
V.	)
STATE OF GEORGIA, ET AL., Defendants.	)
VICKI HANSBERGER, DOROTHY FELTON and TERESA PROCTOR, Applicants for Intervention	)

INTERVENOR APPLICANTS'

FIRST AMENDMENT TO MOTION TO INTERVENE

NOW COME Vicki Hansberger, Dorothy Felton and Teresa Proctor (hereinafter collectively referred to as "Movants") and, in accordance with F.R.C.P. 15 (a) hereby amend their Motion for Intervention, prior to the service upon them of any responsive pleading thereto, by submitting herewith an Affidavit of Movant Teresa Proctor in support thereof and a Memorandum in Support of Motion to Intervene, in supplementation and amendment of such Motion.

This 29th day of March, 1996.

Robert J. Proctor
Georgia Bar No. 588438
Attorney for Movants

Of Counsel

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Atlanta, Georgia 30326
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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for Plaintiff with the foregoing AMENDMENT TO MOTION INTERVENE, together with AFFIDAVIT IN SUPPORT OF MOTION FOR INTERVENTION and MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE by facsimile transmission and by depositing a copy of same in the United States mail with sufficient postage delivery addressed to the following:

Janet Reno
Isabelle Katz Pinzlier
Elizabeth Johnson
Donna M. Murphy
Richard B. Jerome
Daniel H. Claman
United States Attorney General's Office
Department of Justice
P.O. Box 66128
Washington, D.C. 20035-6128

This is to further certify that I have served the following additional parties, whom I believe to be counsel for the Defendants, with a copy of such pleading by facsimile transmission and by depositing a copy of same in the United States mail with sufficient postage to insure delivery addressed to the following:

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Legislative Counsel
316 State Capitol Building
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This 29th day of March, 1996.

Robert J. Proctor
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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

THE UNITED STATES OF AMERICA, Plaintiff,	) CIVIL ACTION FILE NO. 1 96-CV-700-JTC
V.	)
STATE OF GEORGIA, et al., Defendants.	)
VICKI HANSBERGER, DOROTHY FELTON and TERESA PROCTOR, Applicants for Intervention	)

AFFIDAVIT INSUPPORT OF MOTION FOR INTERVENTION

BEFORE ME, a notary public, came TERESA PROCTOR (hereinafter referred to as "Affiant") and, having been first duly sworn, did depose and say as follows:

1. Affiant makes this affidavit from her personal knowledge with the understanding that it will be used in support of the Motion for Intervention filed on her behalf and on the behalf of others in this action.

2. Affiant is of the age of majority.

3. Affiant resides and is domiciled at 475 Huntcfiff Green, Atlanta, Fulton County, Georgia 30350 and is a registered voter. Affiant's voting precinct is Precinct SS22, as so designated by the Fulton County Board of Registration and Elections.

4. Affiant's precinct is within the limits of Georgia State House 43 and State Senate District 56.

5. Affiant's present representative in the Georgia House is Dorothy Felton, who is well and personally known to Affiant.

6. Affiant's present representative in the Georgia Senate is Sallie Newbill. According to an article in the March 27, 1996, edition of the *Sandy Springs Neighbor*, a true and correct copy of which is attached hereto as "Exhibit "A", Ms. Newbill will not be seeking re-election to the State Senate and furthermore intends to remove her residence to Virginia.

7. Affiant is well and personally acquainted with Vickie Hansberger, and knows from her own personal knowledge that Mrs. Hansberger intends to qualify to run for State Senate District 56, having attended both Mrs. Hansberger's formal announcement of her candidacy and several meetings which have been held at Affiant's home with Mrs. Hansberger and others in preparation for such campaign.

FURTHER AFFIANT SAYETH NOT.

This 29th day of March, 1996.

TERESA D. PROCTOR

Sworn to and subscribed before me, a notary public for the State of Georgia, this 29th day of March, 1996.

NOTARY PUBLIC
My commission expires: 12-28-98
[NOTARIAL SEAL]

EXHIBIT "A"

Sen. Newbill moving to Virginia

By Joe Donovan
Neighbor Staff Writer

State Sen. Sallie Newbill, R-Sandy Springs, has decided to "go home."

Mrs. Newbill, 53, who has held the District 56 seat since 1988, will not seek re-election because she has decided to move back to her home state of Virginia. She said the move is a "family decision" brought on by the graduation of her son, T.C., from high school. He will be a freshman at Virginia Tech in the fall.

S. Newbill

Reports that had been circulating about various offices she planned to seek were false, she said. The only other office the senator said she had considered running for was the state school superintendent post currently held by Linda Schrenko.

It had been rumored that Mrs. Newbill would run for secretary of state.

She said she is leaving the area that has been her home for the past 28 years with mixed emotions.

"I'm going to miss all of my friends here, but our family is in Virginia," Mrs. Newbill said. Both she and her husband, Tom, grew up in Virginia before moving to Sandy Springs in the 1960s. Although the decision to leave may be hard, the senator remembered her decision to locate to the North Fulton area as being an easy one.

"My husband was in graduate school at Georgia Tech," she said. "The transition here was easy." Mrs. Newbill, who spent two years teaching at North Springs High School, said she would like to be remembered as someone who is "honest and never fails to stand up and be counted."

The senator also reflected on the first campaign for her seat. Many of the issues, she said, "were the same," when she defeated Roswell resident Haskew Brantley in the Republican primary. "I think I got 58 percent of the vote," Mrs. Newbill went on to defeat her Democratic opponent, East Cobb resident Larry Talley, with "about 73 percent" of the vote. Those early days, she said, taught her lessons about campaigning that have lasted a lifetime.

"You campaign every single day," she said. "You return phone calls, answer the mail and go to meetings." It was also those early days in which, she said, she had some of her toughest legislative battles.

"My first year, we fought a landfill issue that was one of the hardest battles I fought," she said. The landfill proposal, which did not succeed, would have turned 300 acres of "pristine," woodland in North Fulton into a dump. The senator said she and opponents of the proposal passed legislation stopping the landfill on Site 13 by requiring sites within a half mile of another county line to secure approval from the neighboring county. In Site 13's case, she said, the neighboring county, Forsyth, was not in favor of the dump.

Sandy Springs, Mrs. Newbill said, will not be "gobbled up by the city of Atlanta" because of legislation that was passed in this session of the Georgia General Assembly. She said she wished "the Sandy Springs incorporation bill would have passed this year (in the House)," but acknowledged that this could happen "next year." In terms of growth, she said she never would have thought Sandy Springs, and the North Fulton area for that matter, would have looked like it does today.

"The growth has been so fast we can't handle it," she said. The schools, roads and services have been stretched because of the population boom that took place in the area. "You can't go back...but the (Fulton) county commissioners have to start requiring larger lot sizes like they do in Cobb County." The quality of life in the area has been compromised, she said, because of the traffic and overcrowding in the schools.

The political climate in Fulton County has also changed, she said, for the worse. "The climate in Fulton County is one in which a small group of people are attempting to dominate the area," she said. Mrs. Newbill singled out state Rep. Mark Burkhalter, R-Alpharetta, and Fulton County Commission Chairman Mitch Skandalakis as part of the "recent phenomenon" of area leaders who are deciding the future of the county.

The senator said she will support Roswell resident Tom Price, who is expected to formally announce his candidacy on March 28, for her seat. The only other candidate in the race at this point is Fulton County Board of Education Member Vicki Hansberger, also a Roswell resident.

"I think he has the capacity and the backround to be an outstanding state senator," she said. Over the past five to six years, the issues senators have had to deal with have become much more "complex" and require more "sophistication." She said she will formally endorse Price when he announces and will "do whatever he would like me to do" during the campaign.

The senator said she anticipates she will be moving into her new home in Virginia, currently under construction, sometime in December. She plans to get involved in Virginia politics when she gets settled and may run for Congress, she said. Virginia, like Georgia, is currently involved with redistricting, and Mrs. Newbill said she isn't sure about the boundaries of her congressional district. Her opponent would likely be Democratic, she added.

Mrs. Newbill was a top campaign official for U.S. House Speaker Newt Gingrich, R-East Cobb, when he ran for Georgia's 6th District seat after it was reconfigured to include most of North Fulton in 1992 and again in 1994.

"Upon learning of Mrs. Newbill's decision after he arrived at Atlanta's Hartsfield International Airport from Washington, D.C., on March 21, Gingrich praised her. "Sen. Newbill has been a great leader in the state Senate, an invaluable advisor to my campaign for the past four years and a personal friend," he said. "We will miss her, but I wish her the best in her new home."

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Supreme Court, U.S.
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(2)

No. 96-63

In the Supreme Court of the United States

OCTOBER TERM, 1995

VICKI HANSBERGER, DOROTHY FELTON AND TERESA PROCTOR, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

WALTER DELLINGER
Acting Solicitor General
DEVAL L. PATRICK
Assistant Attorney General
STEVEN H. ROSENBAUM
MICHELLE ARONOWITZ
Attorneys
Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether the appeal of the district court's denial of appellants' motion to intervene in this Section 5 enforcement action is moot.

2. Whether the district court properly denied appeallants' motion to intervene.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 96-63

VICKI HANSBERGER, DOROTHY FELTON AND TERESA PROCTOR, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

Pursuant to 28 U.S.C. 2106 and Rule 18.6 of the Supreme Court Rules, the Solicitor General, on behalf of the United States, moves that this appeal be dismissed as moot or that, in the alternative, the ruling of the district court denying intervention to appellants be affirmed.

OPINIONS BELOW

The orders of the three-judge district court granting in part and denying in part a permanent injunction for the United States (J.S. App. 1-8) and denying appellants' motion to intervene (J.S. App. 9-23) are unreported.

JURISDICTION

The judgment of the district court denying appellants' motion to intervene was entered on April 9, 1996. Appellants' notice of appeal (J.S. App. 24-27) was filed on June 4, 1996, the jurisdictional statement was filed on July 11, 1996, and the appeal was docketed on July 12, 1996. The jurisdiction of this Court is invoked under 42 U.S.C. 1973c and 28 U.S.C. 2101(b).

STATEMENT

1. Under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, Georgia may not implement a change in any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" unless (1) it has obtained a declaratory judgment from the United States District Court for the District of Columbia that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or (2) it has submitted the proposed change to the Department of Justice for administrative preclearance and the Department has interposed no objection.

This case concerns redistricting plans for Georgia's state legislature. In April 1992, the State of Georgia enacted redistricting plans for the Georgia House of Representatives and the Georgia Senate, Ga. Code Ann. §§ 28-2-1 and 28-2-2 (Michie 1993), which were precleared by the Attorney General pursuant to Section 5 of the Voting Rights Act. With only limited and precleared changes, the State used these 1992 redistricting plans for elections in 1992 and 1994. J.S. App. 2.

2. In September 1995, the State of Georgia enacted new redistricting plans for the State House of Repre-

sentatives and the State Senate. The State submitted these 1995 plans to the Attorney General for review, and, on March 15, 1996, the Attorney General interposed timely objections to the plans. J.S. App. 2-4.

3. On March 5, 1996, several residents of the State of Georgia filed an action in the Southern District of Georgia challenging the 1992 Georgia House and Senate redistricting plans as unconstitutional racial gerrymanders, *Johnson* v. *Miller*, No. CV196-040 (*Johnson III*).[1] On March 18, 1996, conceding that the 1992 state legislative redistricting plans were in its view unconstitutional, the State of Georgia sought imposition of the unprecleared 1995 redistricting plans as a remedy for alleged constitutional violations in the 1992 plans. J.S. App. 3; Compl. Exh. C.

4. On March 21, 1996, the United States filed the present action in the Northern District of Georgia to enjoin the State of Georgia from violating Section 5 of the Voting Rights Act by seeking to implement the unprecleared 1995 redistricting plans. J.S. App. 4.

5. Appellants moved to intervene in the present action on March 25, 1996. Their motion to intervene (J.S. App. 28-32) stated that one appellant is a candidate for Georgia Senate District 56, one is a candidate for reelection for Georgia House District 43, and the

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[1] For a history of the *Johnson* litigation, see *Johnson* v. *Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994) (*Johnson I*) (finding equal protection violation in Georgia's 11th congressional district), aff'd, 115 S. Ct. 2475 (1995), on remand, 922 F. Supp. 1552 (S.D. Ga. 1995) (*Johnson II*) (finding equal protection violation in Georgia's 2d congressional district), and on remand, 922 F. Supp. 1556 (S.D. Ga. 1995) (*Johnson II*) (redrawing Georgia's congressional districts to remedy equal protection violations), prob. juris. noted, *Abrams* v. *Johnson*, 116 S. Ct. 1823 (1996) (Nos. 95-1425 & 95-1460).

third is a registered voter in both Senate District 56 and House District 43. J.S. App. 28-29, 39-40.

Appellants did not file a pleading setting forth the claim or defense for which intervention was sought, as required by Federal Rule of Civil Procedure 24(c). Their motion to intervene, however, seems to assert that, if allowed to intervene, appellants would raise both as-applied and facial constitutional challenges to Section 5 of the Voting Rights Act. Appellants' motion stated that they should be granted intervention because the United States' requested relief would "directly affect the conduct of the election[s]" (J.S. App. 28, 29), and because the state defendants would not adequately represent their interests by asserting a counterclaim for a declaratory judgment that Section 5 is unconstitutional (*id.* at 30). They stated that the United States' requested relief, if granted, would likely result in no elections being held in 1996, and because there is no hold-over provision in Georgia law, "the governance of [Georgia] will be placed in the hands of its executive branch of government in a quasi-martial emergency or in the hands of the federal courts." *Id.* at 29-30. Appellants asserted that this outcome would violate their rights under the Georgia Constitution, as well as their rights under the Guarantee Clause, the Privileges and Immunities Clause, and the Fifth, Ninth, Fourteenth, and Fifteenth Amendments of the United States Constitution. *Id.* at 30.

6. The United States opposed the intervention, as did the state defendants. The three-judge district court heard argument on the United States' motion for preliminary and permanent injunction on April 4, 1996. Appellants argued their intervention motion (Tr. 5-13), were granted provisional intervenor status

for purposes of the hearing only (Tr. 26), and argued the merits of their facial challenge (Tr. 55-58).

7. On April 9, the district court enjoined the state defendants from implementing the 1995 redistricting plans unless and until precleared, or unless and until adopted as an interim remedy by the *Johnson III* court. J.S. App. 8. That order left the precleared 1992 state legislative plans in place for the 1996 elections.

8. On the same day, April 9, the district court denied appellants' motion for intervention. J.S. App. 9-23. The court denied intervention as of right for the as-applied challenge because it found that appellants' asserted interest was too remote: "First, it is not at all clear that the 'likely result' of this action will be that no elections will take place in 1996. Second, it is not at all clear that the absence of timely elections would deny the Applicants their right to a republican form of government by placing Georgia under martial law or under rule of the courts." *Id.* at 19. It denied intervention as of right for the facial challenge because it found that, to the extent that appellants even had a distinct interest in a declaratory judgment that Section 5 is unconstitutional, such interest would not be impaired by a judgment in this action and could be vindicated in a separate lawsuit. *Id.* at 20.

The district court denied permissive intervention because appellants' putative counterclaim did not have a question of law or fact in common with the United States' claim and the delay caused by appellants' intervention would unduly prejudice both the original parties and the public interest. J.S. App. 20-22.

9. On April 30, 1996, the three-judge court in *Johnson III* ruled on plaintiffs' motion for prelimi-

nary relief.[2] It issued its memorandum opinion on May 24, 1996. *Johnson III*, 929 F. Supp. 1529 (S.D. Ga. 1996). The court found a likelihood that some of the districts in the 1992 plans would be found unconstitutional and ordered in place for the 1996 elections a large part of the unprecleared 1995 plans as an interim remedy.[3]

Appellants did not seek to intervene in *Johnson III*. The interim remedy was not appealed, the constitutional challenge to the state legislative districts in the 1992 plan is now being litigated on its merits, and the 1996 elections are proceeding under the court-ordered plan. The primary was held on July 9, the runoff was held on August 6, and the general election will be held on November 5.

ARGUMENT

This appeal from the denial of appellants' motion to intervene should be dismissed as moot. Appellants sought intervention to oppose an injunction against implementation of the unprecleared 1995 plans and to vindicate their asserted interest in seeing to it that state legislative elections be held in 1996. Another three-judge court, however, has since ordered the 1996 elections to proceed under its own remedial redistricting plans which, as they affect appellants' districts, are identical to the unprecleared 1995 plans that appellants seek to implement. Thus, there is no longer a live controversy in which appellants can

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[2] The *Johnson III* court had granted the United States' motion to intervene on April 9, 1996.

[3] In particular, the court adopted the unprecleared 1995 plan for House District 43 and Senate District 56, the two districts in which the three appellants reside. *Johnson III*, 929 F. Supp. at 1561.

intervene to challenge the constitutionality of Section 5.[4]

1. Appellants' as-applied challenge is moot. Appellants claimed that if the unprecleared 1995 plans were enjoined, as requested by the United States, the 1996 elections would be cancelled, Georgia would revert to quasi-martial or judicial rule, and their state and federal constitutional rights would thereby be violated. The 1996 elections, however, have been ordered to proceed by the district court in *Johnson III*. The primary and runoff elections have been held, and the general elections will be held November 5. There is thus no live controversy as to whether the United States' Section 5 enforcement action will violate appellants' constitutional rights by causing the 1996 elections to be cancelled. See *Hall* v. *Beals*, 396 U.S. 45, 48 (1969) (per curiam) (constitutional challenge to residency requirement for presidential election mooted when State lowered requirement from six to two months, and plaintiffs would have met the two-month requirement); *Gray* v. *Board of Trustees*, 342 U.S. 517 (1952) (per curiam) (constitutional challenge to university's refusal to admit African Americans mooted when plaintiffs were admitted).

2. Appellants' facial challenge is moot. Appellants seek to intervene to counterclaim for a declaratory judgment that Section 5 is unconstitutional on its face. Declaratory judgment jurisdiction, however, requires "concrete legal issues, presented in actual cases, not abstractions." *Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969). Appellants' counterclaim no

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[4] To avoid mootness, the actual controversy must exist at all stages of review, including appeal. *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974).

longer presents a live controversy because the underlying action between the United States and Georgia has been superseded by the preliminary injunction granted in *Johnson III*. See *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 478 (1990) (holding that request for declaration that Florida state statutes violate Commerce Clause is moot because, due to superseding federal law, "no matter how the Commerce Clause issues in this suit are resolved the [particular] application [in this case] can constitutionally be denied").

Pursuant to Section 5, the United States sought an injunction in this case to prevent the State of Georgia from implementing the unprecleared 1995 redistricting plans. Appellants sought intervention to oppose the United States' request for an injunction against the 1995 plans. On April 9, the district court enjoined the State from implementing the unprecleared 1995 plans, but the injunction was contingent on the 1995 plans not being adopted, in whole or in part, by the *Johnson III* court as an interim remedy for a finding that the 1992 plans are unconstitutional.

Appellants' facial challenge became moot on April 30 when the *Johnson III* court superseded the injunction issued in this case by imposing its own redistricting plans for the 1996 elections as an interim remedy for the likely unconstitutionality of parts of the 1992 plans. The *Johnson III* court adopted the 1995 redistricting plans for all but two of the 56 Senate districts, and all but six of the 180 House districts.[5] In particular, the *Johnson III* court

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[5] In keeping with the remedial principle of deference to legislative reapportionment decisions, see *Upham* v. *Seamon*, 456 U.S. 37 (1982) (per curiam), the *Johnson III* court used the

adopted the 1995 redistricting plans for both House District 43 and Senate District 56, in which appellants reside. The *Johnson III* court has thus resolved the underlying dispute in which appellants seek to intervene. Redistricting for the 1996 elections is now under the control of the *Johnson III* court, not the district court in this case. See *Public Serv. Co.* v. *Consolidated Utils. & Communications, Inc.*, 846 F.2d 803, 808, 809 (1st Cir. 1988) (bankruptcy filing mooted Securities Exchange Act issues because, "[w]hile [plaintiff] is in bankruptcy, the bankruptcy rules—and not the proxy rules—govern the behavior of [the] parties" and, "regardless of the decision that this court might reach on the merits, the outcome of the bankruptcy proceeding would be the same"); *United States* v. *Wylie*, 730 F.2d 1401, 1402 (11th Cir. 1984) (appeal of order quashing summons to produce documents mooted where defendant no longer possessed documents); *National Bulk Carriers, Inc.* v. *Princess Management Co.*, 597 F.2d 819, 825 n.13 (2d Cir. 1979) (appeal of denial of intervention mooted by affirmance of main action on appeal where intervention could not have afforded prospective intervenor more than the relief already granted on appeal).

1995 plans for those districts to which the Attorney General had not interposed objections. *Johnson III*, 929 F. Supp. at 1561. The *Johnson III* court also used the 1995 plans for those districts in which it found a likely constitutional violation in the 1992 plans. *Id.* at 1562-1566. This left only eight districts for which 1995 plans were not used: Senate Districts 12 and 14 in Dougherty, Webster, and Stewart Counties, and House Districts 148, 149, 150, 151, 152, and 153 in Chatham County. *Id.* at 1566-1567. (The memorandum opinion states that there are five house districts in Chatham County, but in fact there are six.)

3. These mooted issues are not capable of repetition yet evading review. This Court has "permitted suits for prospective relief to go forward despite abatement of the underlying injury only in the 'exceptional situations' where the following two circumtances were simultaneously present: (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Lewis* v. *Continental Bank Corp.*, 494 U.S. at 481 (1990) (internal quotation marks and citation omitted). The precipitating event for a Section 5 challenge is a change in an election practice or procedure. Unlike the election itself, the election practice or procedure will not necessarily expire before a claim can be fully litigated. In this case, it was the unusual and intervening event of the preliminary injunction in *Johnson III* ordering the 1996 elections to proceed under plans identical in their pertinent aspects to the unprecleared 1995 plans enjoined in this action that mooted appellants' claims. An intervening constitutional challenge to the existing state legislative redistricting plans of that sort is not likely to moot out every constitutional challenge to Section 5 of the Voting Rights Act. Cf. *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969) (exception to mootness doctrine applied to avoid mooting constitutional challenge to candidacy requirements after every election). Thus, appellants' claims are not capable of repetition yet evading review.

4. If this case is not moot, the district court's ruling denying intervention under Federal Rule of Civil Procedure 24 should be affirmed. The primary interest that appellants asserted to support their

right to intervene is their interest in avoiding a situation where no state legislative elections at all are held in Georgia this year. As the district court ruled, however, a threat to that interest was quite remote from any of the questions that were at issue in this case. See J.S. App. 19. First, an injunction against unprecleared voting changes under Section 5 does not ordinarily preclude the holding of an election, and it did not do so in this case. See *City of Rome* v. *United States*, 446 U.S. 156, 182-183 (1980) (rejecting constitutional challenge to the Voting Rights Act based on the fact that elections had not been held in Rome for six years because "[t]he Act does not * * * prevent a covered jurisdiction from holding elections; rather, it simply provides that elections may be held either under electoral rules in effect on November 1, 1964, or under rules adopted since that time that have been properly precleared"). Moreover, as the district court also noted (J.S. App. 19), even the delay of elections in the State would not necessarily have injured their interests, since "Georgia's legislature is out of session for most of the calendar year anyway" and "the absence of ongoing legislative action does not deny Georgians the right to a republican form of government, place them under martial law, or place their governance 'in the hands of the federal courts.'"

Nor should appellants have been granted a right to intervene to bring a counterclaim for a declaratory judgment that Section 5 of the Voting Rights Act is unconstitutional. This Court has squarely held that Section 5 of the Voting Rights Act is constitutional. See, *e.g.*, *City of Rome* v. *United States*, *supra*; *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). A federal court has no obligation to permit individuals

to intervene in ongoing litigation merely in order to insert into the litigation constitutional challenges to a statute that have already been rejected by this Court. That is particularly true where, as here, circumstances require expedited litigation of the case in which intervention is sought. See J.S. App. 21.

Finally, the district court correctly denied permissive intervention in this case. As the court explained (J.S. App. 21), appellants' claims do not present "a question of law or fact in common" with the main action. In any event, Rule 24(b) provides that "[i]n exercising its discretion [regarding permissive intervention] the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b). The district court noted that appellants would have required months of discovery and considerable trial time to present their claims to the district court. J.S. App. 21. The resulting delay would have "unduly prejudice[d] both the original parties to this case and the public interest in promptly resolving this dispute." *Id.* at 22.

CONCLUSION

This appeal of the denial of appellants' motion for intervention should be dismissed as moot. In the alternative, the district court's order denying intervention should be affirmed.

Respectfully submitted.

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